

STATE OF MICHIGAN
COURT OF APPEALS

TAVIA D. BUNGARD,

Plaintiff/Counterdefendant-
Appellant,

V

WALTER E. BUNGARD,

Defendant/Counterplaintiff-
Appellee.

UNPUBLISHED

October 16, 2003

No. 238136

Montmorency Circuit Court

LC No. 97-003540-DM

Before: Meter, P.J., and Saad and Schuette, JJ.

PER CURIAM.

Plaintiff appeals from a judgment of divorce, and claims that the trial court erred (1) in its division and award of marital assets, (2) regarding its determination of spousal and child support, and (3) in failing to award attorney fees. We affirm in part, reverse in part, and remand for further proceedings.

I

Property Division

Plaintiff presents several arguments regarding the trial court's valuation and distribution of marital assets.

Contrary to what plaintiff argues, the trial court did not err by failing to determine the value of assets that it ordered sold. *Olson v Olson*, 256 Mich App 619, 627 n 5; ___ NW2d ___ (2003). However, we agree that the court erred by failing to determine the value of other disputed assets, which the court simply awarded to the party in possession of the asset. Before making a property division, the trial court must make specific findings as to the value of the property being awarded if the value is in dispute; failure to do so constitutes clear error. *Olson, supra*, at 627-628; *Beaty v Beaty*, 167 Mich App 553, 556; 423 NW2d 262 (1988). Here, rather than determining the value of the items in the property lists submitted by the parties, the court awarded the personal property, household furniture, and fixtures to the party in possession of those items. Plaintiff and defendant disagreed about the values of those items. Therefore, the court's failure to determine and assign a value to the items was erroneous. *Olson, supra*, at 627-628. Indeed, at trial, the court reserved discussion of the valuation of the disputed items for a

further hearing, but apparently failed to hold such a hearing. We therefore reverse that portion of the trial court's judgment and remand for further proceedings and factual findings concerning the items of personalty reflected in the parties' property lists.

Plaintiff also says that the trial court erred in its valuation of defendant's veterinary practice. We disagree. We review the trial court's factual findings for clear error. *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992). A finding is clearly erroneous if, upon review of the entire record, we are left with the definite and firm conviction that a mistake has been made. *Draggou v Draggou*, 223 Mich App 415, 429; 566 NW2d 642 (1997).

Plaintiff contends that the trial court should have accepted the values provided by her expert concerning items taken by defendant as business tax deductions, and which her expert then added back to the business to determine defendant's "true profit" or "true earnings" for the purpose of determining the value of the practice in 1998.¹ Plaintiff maintains that the trial court's decision to subtract a portion of the added value was clearly erroneous because defendant did not present evidence disputing her expert's methodology or values. We disagree. Although defendant did not contest the admission of plaintiff's expert's report, he did challenge the addition of certain items to determine a true profit. The trial court did not clearly err by re-subtracting (1) \$8,000 in "excess wages," which represented an alleged overpayment to defendant's employees; (2) \$3,690 in automobile expenses, which represented the business use of defendant's truck, and (3) \$10,000 in "hidden expenses," or expenses allegedly improperly charged to the business. We agree with the trial court that plaintiff's expert's rationale for the addition of "excess wages" was speculative in light of the W-2 information for 1997 and 1998, and the absence of sound support for the expert's valuation in reference to the "typical" veterinary practice.² We further agree that defendant was entitled to claim a portion of his truck expenses as a business expense. The trial court's decision concerning the "hidden expenses" is not erroneous, given the tax information furnished to the court and the admission by plaintiff's expert that he arrived at this figure through a certain degree of "creativity." Plaintiff has failed to show that the trial court clearly erred in its valuation of the veterinary practice.

¹ In a related argument, plaintiff appears to challenge the trial court's decision to use 1998 values in light of defendant's greater income in 2000. However, although plaintiff urges this Court to recalculate the value of the business based upon a gain in collections of 14.3 percent, she does not address whether business costs, such as inventory costs or the value of a replacement doctor, would likewise have risen during this period. The trial court has discretion to value assets at a time other than the date of trial or entry of the judgment of divorce. *Byington v Byington*, 224 Mich App 103, 114 n 4; 568 NW2d 141 (1997). Because plaintiff has failed to adequately explain the enhanced business value, we find the trial court's reference to the 1998 report to be properly within its discretion.

² With regard to her claim that these wages were excessive, plaintiff also challenges the trial court's refusal to allow her to review tax records for employees other than defendant's current girlfriend. However, in response to a question during a pretrial hearing as to why she sought this information, plaintiff's counsel stated that she did not intend to argue that defendant had overpaid any other employee. Because the trial court allowed plaintiff to review defendant's girlfriend's W-2 information, she cannot now claim that she was prejudiced by the court's decision. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000).

Plaintiff also argues that the trial court erred by failing to decide whether defendant violated a previous court order prohibiting him from improperly disposing of marital property. Plaintiff maintains that defendant violated this order by liquidating funds from a life insurance policy, selling a tractor, and purchasing an automobile for the couple's son. With regard to the automobile, because plaintiff admitted at trial that the vehicle was purchased for her son with her permission, she cannot now claim error. *Living Alternatives for the Developmentally Disabled, Inc v Dep't of Mental Health*, 207 Mich App 482, 484; 525 NW2d 466 (1994). With regard to the remaining property, we agree that the record plausibly supports defendant's claim that the trial court implicitly credited his explanation that he used the proceeds from the assets in question to pay marital debts and purchase replacement marital property. However, because the court failed to make specific findings concerning this issue, and because a remand for further proceedings is necessary, we direct the trial court to further consider this issue on remand and to provide appropriate findings and an amplified explanation of its decision regarding this matter.

Also, plaintiff alleges that the trial court erred in failing to find that either party was at fault for the breakdown of the marriage. We disagree. At trial, the parties provided significantly differing accounts of the circumstances that led to the breakdown of the marriage. Plaintiff testified that she filed for divorce because of defendant's extreme cruelty, his mental problems, and his decision to leave her for his receptionist. Defendant, by contrast, maintained that the parties' problems began in 1995, when plaintiff allegedly "discovered" that she had been severely sexually abused by family members as a small child, leading to a series of emotional breakdowns and increasingly irrational behavior. The trial court stated on the record that it was unable to entirely believe either party's testimony under the circumstances.

The court did not clearly err. Plaintiff's allegations were corroborated to some extent by the testimony of defendant and other witnesses. In particular, defendant admitted that he contemplated suicide at least once. Also, the county sheriff, who was a family friend, testified that he found an orange juice mixture containing barbiturates and alcohol in defendant's possession. In addition, defendant pleaded no contest to an incident of spousal abuse, and a former veterinary employee stated that she observed defendant verbally abuse plaintiff on several occasions. Moreover, it was undisputed that defendant became involved in an affair with his receptionist and, according to the receptionist's husband, the affair began in 1996.

However, as the trial court observed, testimony by both plaintiff and the sheriff also provided support for defendant's allegations. Plaintiff admitted that she wrote letters to defendant referring to him as "daddy" and also wrote letters to her alleged younger personality, "Darcie." Plaintiff also admitted that she received psychological counseling from January 1996 until December 1997. She further admitted that she had physically attacked defendant on a number of occasions. Moreover, the sheriff's vivid description of plaintiff's unusual behavior in July 1996 negated plaintiff's claims that the breakdown of the marriage was attributable solely to defendant's conduct. Affording deference to the special opportunity of the trial court to judge the credibility of the witnesses, *Draggoo, supra* at 429, the trial court's failure to find that one party was more at fault than the other was not clearly erroneous.

Plaintiff also argues that the trial court erred in failing to make specific findings of fact concerning relevant property division factors. Plaintiff correctly notes that the trial court did not specifically discuss any factor, other than fault, in justifying its decision to split the marital property equally. Although it is generally improper for a trial court to focus exclusively on fault,

see *Sparks, supra* at 163, here, plaintiff agreed before trial that, apart from the issue of fault, an equal division of the marital estate would be equitable and that, instead, she would be seeking alimony. Additionally, at the outset of trial, the court stated, without objection, that it intended to distribute the marital property equally, with the possible exception of the allocation of fault. It reiterated that position during trial, again without comment by plaintiff's counsel. In sum, it is apparent from the record that the parties, and certainly plaintiff, understood that the issue of fault would be the principal issue affecting the property distribution. Plaintiff may not now take a position contrary to her position at trial by arguing that, apart from the issue of fault, an equal division of the marital assets is inequitable. *Living Alternatives for the Developmentally Disabled, Inc, supra* at 484. Accordingly, we find no error in this regard.

Plaintiff also challenges the trial court's overall property division, asserting that it is inequitable. Because we find it necessary to remand for further proceedings and additional findings concerning the valuation and award of certain assets, we conclude that our evaluation of this issue in this appeal is inappropriate.

II

Spousal Support

An award of spousal support is within the trial court's discretion. *Gates v Gates*, 256 Mich App 420, 432; 664 NW2d 231 (2003). The main objective of spousal support is to balance the incomes and needs of the parties in a way that will not impoverish either party. Spousal support is to be based on what is just and reasonable under the circumstances of the case. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). Among the factors a court should consider are: (1) the past relations and conduct of the parties; (2) the length of the marriage; (3) the abilities of the parties to work; (4) the source and amount of property awarded to the parties; (5) the parties' ages; (6) the abilities of the parties to pay alimony; (7) the present situation of the parties; (8) the needs of the parties; (9) the parties' health; (10) the prior standard of living of the parties and whether either is responsible for the support of others; (11) contributions of the parties to the joint estate; (12) a party's fault in causing the divorce; (13) the effect of cohabitation on a party's financial status; and (14) general principles of equity. *Gates, supra*, at 435-436; *Ianitelli v Ianitelli*, 199 Mich App 641, 644; 502 NW2d 691 (1993); *Thames v Thames*, 191 Mich App 299, 308; 477 NW2d 496 (1991). In addition, "where both parties are awarded substantial assets, the court, in evaluating a claim for [spousal support], should focus on the income-earning potential of the assets and should not evaluate a party's ability to provide self-support by including in the amount available for support the value of the assets themselves." *Hanaway v Hanaway*, 208 Mich App 278, 296; 527 NW2d 792 (1995).

Plaintiff contends that the trial court erred by failing to make specific findings of fact regarding the appropriate factors relevant to an award of spousal support. We agree.

Although a court need not consider or comment on every factor, it is required to make specific findings of fact as to those factors that are relevant to the particular case before it. *Beason v Beason*, 435 Mich 791, 798; 460 NW2d 207 (1990); *Ianitelli supra* at 643. Here, the trial court made the following factual findings concerning spousal support:

1. Plaintiff has in excess of \$160,000 in liquid assets plus one half the liquidation value of the remainder of the marital estate and/or property of comparable value.

2. Plaintiff has a college degree and is without any serious impediment toward finding employment.

3. The Court has not found fault attributable to either party.

Considering further the duration of the marriage of the parties and the difficulty of Plaintiff reestablishing a position within the work force, the Court AWARDs one hundred (\$100) dollars per week alimony for a period of two years.

We agree that the trial court erred in deciding this issue. Although stating that plaintiff would receive substantial marital assets, the court failed to discuss the source and income potential of those assets, as well as the assets awarded to defendant. While the trial court, in a separate portion of its opinion, determined defendant's income to be \$65,117 in 1998, it failed to determine defendant's income at the time of the judgment. The court's decision does not reflect that, in deciding spousal support, it gave consideration to other relevant factors, such as the past relations and conduct of the parties, the parties' ages, the ability of defendant to pay alimony, the present situation of the parties, the needs of the parties, the parties' health, the parties' prior standard of living and whether either party is responsible for the support of others, contributions of the parties to the joint estate, or the effect of cohabitation on a party's financial status. Also, there was no discussion of the parties' relative monthly expenses. As with the property distribution, the court seemed to place disproportionate weight on its determination that neither party was more at fault for the breakdown of the marriage.

Accordingly, we remand this case and direct the trial court make further findings of fact regarding the relevant spousal support factors.

III

Attorneys Fees

Plaintiff also argues that the trial court erred by failing to award her attorney fees to enable her to pursue this action. We agree.

We review a trial court's decision to award attorney fees for an abuse of discretion. *Stoudemire v Stoudemire*, 248 Mich App 325, 334; 639 NW2d 274 (2001). In a divorce action, attorney fees are not recoverable as of right, but are "awarded only where necessary to preserve the party's ability to carry on or defend the action." *Id.*; see also MCL 552.13(1); MCR 3.206(C)(2). An award of attorney fees may be proper if the parties' incomes are significantly disparate. *Vollmer v Vollmer*, 187 Mich App 688, 690; 468 NW2d 236 (1990). A party should not be required to invade the principal amount of a property settlement to pay attorney fees when the property settlement is intended to provide support. *Hanaway*, *supra* at 299; *Maake v Maake*, 200 Mich App 184, 189; 503 NW2d 664 (1993).

We conclude that the trial court erred in refusing to award plaintiff attorney fees. The testimony showed that plaintiff owed \$15,300 in attorney fees, after already having paid \$8,000 from assets awarded to her in the property division. Plaintiff testified that she earned approximately \$16,721 in 2000. In contrast, the trial court found that defendant earned \$65,117 in 1998,³ and perhaps more in the latter years, given his increased receipts. Even taking into account the spousal support award of \$100 per week, there was still a large disparity in the parties' incomes. Although plaintiff was awarded an approximately equal portion of the marital assets, it is apparent that defendant had a substantial income advantage after the divorce. Considering the amount of plaintiff's attorney fees and plaintiff's modest income compared to defendant's, plaintiff would be required to substantially invade her marital assets in order to pay her attorney fees. Under the circumstances, the court erred by failing to award plaintiff at least some portion of her attorney fees. *Hanaway, supra*. Because we remand for further proceedings concerning this and other issues, plaintiff's related claim that the court erred by failing to conduct a hearing on this issue is moot. See *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998).

IV

Child Support

Plaintiff says that the trial court also erred by failing to make a decision as to child support. We note that the trial court addressed the issue of child support in its judgment of divorce, electing to continue the temporary support amount of \$117 a week. The judgment also indicates that the matter would be referred to the friend of the court for a recommendation whether a different amount might be justified, and that any modification would be retroactive to the date of entry of the judgment.⁴ The record does not reflect a further decision concerning this matter. In her brief, plaintiff provides little discussion, and no supporting authority, for her position that the trial court's decision was improper. In light of the insufficient manner in which this issue is briefed by plaintiff, we decline to address it further and find that it has been abandoned. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999); *FMB-First Michigan Bank v Bailey*, 232 Mich App 711, 718; 591 NW2d 676 (1998).

V

Fair Trial

Lastly, plaintiff raises a number of claims of evidentiary error that she argues denied her a fair trial. However, apart from presenting a laundry list of alleged errors, plaintiff has failed to adequately discuss any of them with sufficient detail. Additionally, she has not presented supporting authority for her position. We conclude that plaintiff has failed to properly present these issues for our consideration and, accordingly, we decline to address them. *Prince supra* at

³ Defendant himself admitted to a 1998 income of at least \$53,715.

⁴ Defendant asserts that this provision was added pursuant to the stipulation of the parties.

197; *FMB-First Michigan Bank, supra* at 718; *Petrus v Dickinson County Bd of Com'rs*, 184 Mich App 282, 294; 457 NW2d 359 (1990);

Affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Henry William Saad
/s/ Bill Schuette